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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 807

INTERNATIONAL SHOE COMPANY, PETITIONER

vs.

RUFUS W. FONTENOT (SINCE SUCCEEDED BY JAMES S. REILY, WHO IN TURN HAS BEEN SUCCEEDED BY ROBERT L. ROLAND), COLLECTOR OF REVENUE, STATE OF LOUISIANA, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT L. ROLAND
Room 403
Capitol Annex
Baton Rouge, Louisiana
Attorney for Respondent

Of Counsel:

RICHARD ALSINA FULTON
FRED S. HAYGOOD
LEVI A. HIMES
ROY M. LILLY, JR.
CHAPMAN L. SANFORD
Attorneys,
Louisiana Department of Revenue

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May it please the Court:

STATEMENT

This is an application for a review, by certiorari, of a final judgment and decree of the Supreme Court of Louisiana.

Petitioner paid certain *net income* taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950.

The facts were stipulated. (R18-21). Petitioner is a foreign corporation engaged in the manufac-

ture and sale of shoes. It sells shoes to Louisiana customers through orders obtained by a regular and systematic solicitation of the Louisiana customers by its fifteen salesmen covering this territory. In this activity, the salesmen display samples in Louisiana, making use of rented hotel rooms or rooms of a public building which have sample rooms available for salesmen. The expense of all such rooms is paid by the company. During the three years in question, petitioner's Louisiana activity resulted in sales totaling $15,497,017.00. However, the contracts of sale were all accepted or rejected outside the state and all orders were filled from outside the state. Petitioner admitted and stipulated that the measure or apportionment is correct, and that the taxes have been correctly determined, if, in fact, they can be constitutionally imposed.

As appears from Appendix I of this brief, the moneys involved were transferred from a segregated account into the State Treasury, some 43 days *after* the decision of the State Supreme Court became final and executory and some 28 days *before* this petition for a writ was filed. Petitioner, on April 7th, some 18 days after this petition for a writ was filed, and 46 days after the moneys were transferred from this segregated account, applied for a stay of execution of the judgment of the Louisiana Supreme Court. The ex parte order obtained by petitioner is annexed as Appendix II. Respondent, will in due course, seek a hearing and reversal of this ex parte action.

ARGUMENT

I.

Under the facts of this case, there is no subject matter upon which the judgment of this court can operate, and any opinion rendered herein would of necessity be advisory only.

When petitioner made no effort to apply for writs or to stay execution of the judgment of the Louisiana Supreme Court, respondent transferred the funds from a non-expendable segregated fund into the State Treasury where they since have been expended in the operation of the State government.

It is submitted that had an appeal been filed, a motion to dismiss would be in order upon the basis of the following statement in the case of *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed. 293:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the

appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 13 Sup. Ct. 876."

See also, *Brown-Forman Distillers Corporation v. Collector of Revenue*, ...U.S....., 79 S.Ct. 602 (1959).

Certainly, if an appeal, a matter of right, be dismissed, a petition for certiorari, which lies within the sound discretion of this Court, should be denied.

Respondent cannot now recover the taxes paid under protest because they were paid into the Treasury in the absence of any effort by petitioner to obtain a stay of execution. Thus, it is also submitted that any opinion rendered herein would be advisory only. This would do violence to the fixed principle of constitutional law that the Supreme Court will not render advisory opinions. *Ashwander v. T. V. A.*, 297 U.S. 288, 56 S.Ct. 466 (1936).

As recently as 1951, in the case of *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U.S. 416, 418, 71 S.Ct. 373, this Court reiterated that principle saying:

"It is argued that the Wisconsin Courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts,

'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S. S. Co.*, 253 U.S. 113, 115, 116, 40 S.Ct. 448 (449), 64 L.Ed. 808, and cases cited; *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 475-477, 36 S.Ct. 212, 216, 60 L.ED. 387.' *St. Pierre v. United States*, 1943, 319 U.S. 41, 42, 63 S.Ct. 910, 911, 87 L.Ed. 1199."

II.

There is no new or important federal question to be decided. Petitioner merely seeks a reversal of the *Georgia* and *Minnesota* cases. (infra)

Such an attempt is not novel, but a similar effort was rejected by this Court earlier this year in the *Brown-Forman Case*, supra. In dismissing that appeal, this Court went on to say:

"Treating the papers whereon the appeal was taken as a petition for certiorari; *certiorari is denied.*" (emphasis added).

The State Supreme Court noted and rejected this effort to use an attempted factual distinction, lack of an office, to justify a reversal when no new Federal questions are presented in a state income tax case.

"In its brief, appellant does not directly assail the ruling in the Hay case (Fontenot v. John I. Hay, Co. 228 La. 1031, 84 So. 2nd 810) *but seeks to distinguish it* from the instant matter on the ground that, there, the taxpayer per-

formed extensive service in Louisiana, *maintaining an office* and staff of employees in this state and using waterways for the operation of its craft." (emphasis supplied) *Brown-Forman Distillers v. Collector of Revenue*, 234, La. 651, 101 So. 2nd 70, 72 (1959)

Respondent respectfully submits that petitioner herein seeks to achieve the very same thing denied the *Brown-Forman* people by this Court earlier this year. In a case with identical issues, certiorari is not justified on the basis of an attempted factual distinction.

Despite petitioner's contention that a new issue is present (Petitioner's brief, p. 3), and transcending the skillful use of "sales dodgers" employed by various purveyers of publications and services (Petitioner's brief, pp. 11, 12 and 13), it is clear that primarily petitioner seeks a reversal of two recently decided cases, viz: *Northwestern States Portland Cement Company v. Minnesota*; *Williams v. Stockham Valves and Fittings, Inc.*..... ..*U.S.*..... 79 S.Ct. 357 (1959).

For example, on page 4 of petitioner's brief we find this statement:

> "(7) The federal questions here at issue have been more fully stated in the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart in the two cases above cited, which dissenting opinion is hereby adopted by reference. It is the position of petitioner (respectfully) *first* that the majority

opinion of the Supreme Court was in error; that the dissenting opinion reached the correct and proper conclusion; and, *second*, in the alternative, that the present case is distinguishable from the two cited cases for the reason, inter alia, that International Shoe Company '. . . had no office, storage space, warehouse or other place of business in Louisiana . . .' Stipulation par. 7, (R. 20)."

Again, petitioner, on page 9 of his brief says:

> "Petitioner adopts the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases as its basic argument. Petitioner submits that the rationale of that dissent is correct, that the majority opinion is in error."

Petitioner cites no authorities and makes no extended argument, saying only:

> "We adopt by reference (as our argument) the dissenting opinion of Mr. Justice Whitaker, Mr. Justice Frankfurter and Mr. Justice Stewart, in the *Georgia* and *Minnesota* cases cited above." (Petitioner's brief, p. 17.)

There is no new question to be decided in this proceeding despite petitioner's clever series of *Queries*. Plaintiff may plead no one's cause but his own. *Del Castillo v. McConnico*, 168 U.S. 674, 18 S.Ct. 229 (1898).

III.

The decision below, particularly in the light of the *Georgia* and *Minnesota* cases, is eminently correct.

As petitioner's brief points out on page 4, there are only two issues in this case.

Does a properly apportioned net income tax, when applied to income derived from interstate commerce, violate the commerce clause of the Federal Constitution?

Does such a tax violate the due process clause of the Federal Constitution?

The first question was clearly and unequivocally answered in the *Georgia and Minnesota* cases, by this Court saying at page 362 of 79 S.Ct.:

> "On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce."

The second question was also answered with these words at page 365 of 79 S.Ct.:

> "Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' *Wisconsin v. J. C. Penney Co.*, supra, at 445. It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process

requirements. *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954). See also *Ott v. Miss. Valley Barge Line*, 336 U.S. 169 (1949); *International Shoe co. v. Washington*, 326 U.S. 310 (1945); and *West Publishing Co. v. McColgan, supra.*"

True, petitioner would have you conclude that he had only minimal contacts with the state. The record shows otherwise. The regular and systematic solicitation of over fifteen million dollars of business volume by 15 salesmen and their method of activity (R. 18-21 and particularly paragraphs 11-13 of the stipulation of facts), is clearly a sufficient nexus.

In fact, the activities of petitioner, are to all intents and purposes, identical with its activities in the case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which was cited in answer to the due process argument advanced in the *Georgia and Minnesota* cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Robert L. Roland
Counsel for Respondent

April ____, 1959

Appendix I

Additional Statement Facts.

Appendix II

Ex parte Order for Stay of Execution and Stay of Mandate, Arrest of Judgment, and Writ of Mandamus issued by Louisiana Supreme Court.

PROOF OF SERVICE

I, Robert L. Roland, attorney of record for respondent in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon petitioner by depositing same this_____ day of April, 1959, in the United States post office, first-class postage prepaid, addressed to the Honorable B. B. Taylor, Jr., attorney of record for petitioner, at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

ROBERT L. ROLAND

APPENDIX I

ADDITIONAL STATEMENT OF FACTS

These facts developed after the rehearing was denied by the Louisiana Supreme Court on January 12, 1959, and are therefor not in the record.

1. Mr. Roland advised the Cashier's Division and the Income Tax Division on February 3, 1959, that the International Shoe Company litigation had been terminated and requested that the divisions take appropriate action to transfer the funds from a segregated account into current collections.

2. On February 23, 1959, Mr. Ben A. Grasser, Head, Office Audit Section, Income and Franchise Tax Division, authorized Mr. A. E. Frederic, Chief of the Cashier's Division, to transfer the $4,936.42 involved from a segregated account into current collections.

3. On February 23, 1959, the transfer was accomplished by transfer No. 501, Check No. 5030.

4. On April 8, 1959, respondent was served with an ex parte order for Stay of Execution, Arrest of Judgment and Writ of Mandamus, dated April 7, 1959, as is more fully set forth in Appendix II.

APPENDIX II

(Stamped) Received Apr. 8 1959 Sheriff's Office Baton Rouge, La.

SUPREME COURT OF LOUISIANA

No. 44,126

INTERNATIONAL SHOE COMPANY,
Plaintiff and Appellant

VERSUS

COLLECTOR OF REVENUE,
Defendant and Appellee

ORDER FOR

(1) Stay of Execution and Stay of Mandate
(2) Arrest of Judgment, and
(3) Writ of Mandamus

On consideration of the petition and motion of International Shoe Company, plaintiff-appellant in the above numbered and entitled cause:

IT IS ORDERED that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause shall be, and it is hereby, stayed pending and until the final disposition of this case by the Supreme Court of the United States of America, and said judgment is hereby arrested, pending such final disposition, and Robert L. Roland, Collector of Revenue of the State of Louisiana, is hereby enjoined from taking any steps whatsoever toward or in the interest of any execution of said judgment in any manner whatsoever, and

IT IS FURTHER ORDERED that, in the event the said Collector of Revenue has, directly or indi-

rectly, transferred or in any manner removed from the status of segregation provided by Louisiana Revised Statutes of 1950, RS 47:1576, any of the moneys which are the subject of this litigation, he is hereby ordered and commanded by this writ of mandamus to retransfer all of said moneys and funds into such a status of segregation, as required by said statute, and is commanded to thereafter retain and hold said moneys and funds in such status of segregation, and in escrow, pending and until the United States Supreme Court shall have made its final disposition of this case.

New Orleans, Louisiana, this 7 day of April, 1959.

s/ JOHN B. FOURNET,
Chief Justice of the Supreme Court,
State of Louisiana

A TRUE COPY
Clerk's Office, New Orleans, April 7, 1959
HAROLD A. MOISE, JR.
Dy. Clerk Supreme Court of Louisiana

Filed April 8, 1958
(Signed) Ruth White
A True Copy April 8, 1959
s/ Ruth White
Dy. Clerk